IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT.

Ram Sukh & ors.	vs.	Mangi Lal & ors.

S.B. Civil Second Appeal No.45/1982 against the judgment and decree dated 16.10.1981 passed by the District Judge, Pratapgarh camp Chittorgarh in Civil Appeal No.64/1977.

Date of Judgment: May 09, 2006.

PRESENT
HON'BLE MR. PRAKASH TATIA,J.

Mr. Rajiv Purohit for the appellants.
Mr. Manish Shishodia for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

Brief facts of the case are that the respondents-plaintiffs Mangi Lal and Kishan Lal filed the suit for cancellation of the sale-deed dated 16.4.1973 executed by appellant no.1-defendant no.1 Ram Sukh, the brother of the plaintiff and son of defendant no.3 Smt. Gokhali in favour of appellant no.2-defendant no.2- Prem Shanker. According to the plaintiffs, *Nohra* in dispute was the property of their father Jagannath. The properties of Jagannath was divided among Jagannath's three sons Ram Sukh, Mangi Lal and Kishan Lal. The said partition of the property was admitted by writing a deed on 25.6.1965 and which was signed by deceased Jagannath and his sons. In view of the said partition, plaintiff no.1, plaintiff no.2 and defendant no.1 all got 1/3 share in the disputed

Nohra. As per the partition dated 25.6.1965, the plaintiffs and defendant no.1's father Jagannath and mother Smt. Gokhali(defendant no.3) were permitted only to live in the *Nohra*. According to the plaintiffs, the defendant no.1, by his influence, got one Will executed from plaintiffs' father Jagannath on 21.2.1972. According to the plaintiffs, by the said Will, defendant no.1 is claiming that he became owner of the *Nohra* despite the fact that on 21.2.1972 said Jagannath had no share in the *Nohra* and he had only right to live in the said *Nohra* with his wife, mother of the plaintiffs and defendant no.1. The plaintiffs also alleged that on 21.2.1972 said Jagannath was not in fit physical and mental condition to execute the Will, therefore, the Will is of no effect.

Defendant no.1 sold the *Nohra* on 16.4.1973 to defendant no.2 by registered sale-deed. Said sale-deed was challenged by the plaintiffs on the ground that defendant no.1 had only 1/3 share, therefore, he could not have sold the entire property to defendant no.2. Defendant no.3 mother of the plaintiffs also has been shown to be the seller in the sale-deed dated 16.4.1973 but that is also of no effect because defendant no.3, the mother of the plaintiffs had no share in the property sold. The plaintiffs, therefore, prayed that the sale-deed may be declared ineffective against the interest of the plaintiffs and it may be declared that the plaintiffs and defendant no.1 each have 1/3 share in the *Nohra*.

All the defendants submitted joint written statement. The

defendants stated that *Nohra* was not ancestral one but it was self-acquired property of Jagannath. The defendants admitted that rest of the properties were partitioned and are in occupation of the parties according to their share but the *Nohra* in question and agricultural land were kept joint and remained with the plaintiffs and defendant no.1's mother and father. According to the defendants, Jagannath executed Will on 12.2.1972 and at that time he was physically and mentally fit to execute the Will and, therefore, defendant no.1, by virtue of said Will, became the owner of the entire *Nohra* and he sold the *Nohra* to defendant no.2 and handed over possession of the *Nohra* to defendant no.2.

The trial court framed issues and plaintiffs Kishan Lal and Mangi Lal both appeared as witness in support of their case and produced witneses Dr.S.S. Das (PW-2), Basanti Lal (PW-4), Badri Lal (PW-5) and one another Kishan Lal s/o Bhagwan Lal as PW-6 and Devi Lal (PW-7). All the three defendants gave their own statements and produced witnesses Ratan Lal (DW-4), Mangi Lal (DW-5), Pushkar Datt (DW-6) and Nand Kishore (DW-7). In rebuttal, the plaintiffs produced witnesses Ravi Datt and Purushottam. The plaintiffs produced various documents including the medical report of the deceased Jagannath and copy of the pedigree, copies of the *Patta* , sale-deed and the partition deed etc.

The trial court in its judgment and decree dated 28.5.1977 held

that the suit property was not the ancestral property of Jagannath. The trial court while deciding issue nos.2 and 3, held that in fact there is no dispute about the deed dated 25.6.1965 and in view of the said deed, it is clear that deceased Jagannath had three sons, Mangi Lal, Kishan Lal and Ram Sukh. The properties were partitioned and were given to Jagannath's sons but the *Nohra* and agricultural land were not partitioned and they remained in possession of Jagannath. The trial court held that the plaintiffs failed to prove that the Will dated 21.2.1972 was executed by Jagannath when he was not in fit physical and mental condition. The trial court also held that since properties were not ancestral of Jagannath, therefore, he had right to give the properties by Will to defendant no.1. In view of the above findings, the trial court accepted defendant no.1 as owner of the property by virtue of Will dated 21.2.1972 and held that the sale-deed executed by defendant no.2 is legal and valid.

The judgment and decree of the trial court was challenged by the plaintiffs by preferring regular first appeal. The first appellate court reversed the finding of the trial court and held that the suit property was ancestral property of Jagannath and was not self-acquired property. The first appellate court also held that the execution of the Will by Jagannath appears to be in suspicious circumstances because of the reason that Jagannath died three months after the execution of the

Will and before that he remained in hospital. The first appellate court also observed that it appears that Jagannath was not in position to do his own work since last ten years before his death and the Will was got registered by calling the Tehsildar (Registering Authority) at house. The first appellate court also observed that when the property was partitioned in the life time of Jagannath, which is proved from Ex.1 dated 25.6.1965, then mere right to live in the house cannot give any title to Jagannath to dispose of the property by executing the Will or otherwise. In view of the above findings, the first appellate court held that the sale-deed executed by defendant no.1 on the strength of the Will alleged to have been executed by Jagannath is illegal and without authority. The first appellate court decreed the suit of the plaintiffs and cancelled the sale-deed Ex.7 dated 16.4.1973. The first appellate court also granted decree for possession in favour of the plaintiffs against the defendant no.2

Being aggrieved against the judgment and decree dated 16.10.1981, this appeal has been preferred by all the three defendants, seller and the purchaser of the property. Following substantial questions of law were framed while admitting this appeal on 1.5.1982:-

> *"(1) Whether the first appellate court was right in holding that Jagannath could not execute the will because of his ill-health without giving a finding to the effect that Jagannath was mentally incapable of making conscious*

execution of the Will ?

(2) Whether the property in dispute was rightly held by the first appellate court to be joint property inspite of the fact that after the partition being effected on 25.6.1965, the suit property fell to the share of Jagannath and his wife ?

The learned counsel for the appellant vehemently submitted that the plaintiffs failed to prove that the property was ancestral. They could not produce any documentary evidence to show that the property was ancestral. It is also submitted that it is clear from deed dated 25.6.1965 that *Nohra* and agricultural land remained in the share of Jagannath and his wife Smt. Gokhali, father and mother of the plaintiffs and defendant no.1. The first appellate court also committed error of law in declaring that Jagannath was not in fit position to execute the Will. It may be true that Jagannath was physically sick but was not mentally sick. It is also submitted that the first appellate court committed serious error of law by declaring that the plaintiffs and defendant no.1 have 1/3 share and, therefore, Jagannath could not have bequeathed the property to Ram Sukh.

The learned counsel for the appellant also submitted that even if all the findings of the first appellate court remained as it is, even then the entire sale-deed could not have been set aside because of the simple reason that admittedly the seller Ram Sukh had 1/3 share and he

sold the property to the defendant-purchaser-appellant. Therefore, the purchaser acquired 1/3 share in the property sold by Raj Sukh(defendant no.1).

The learned counsel for the respondents submitted that the appeal of the appellant deserves to be dismissed merely on the ground that the appeal has abated. The learned counsel for the respondents pointed out that one of the co-sharer-plaintiff Mangi Lal, who was impleaded in this appeal died and after the death of Mangi Lal, his legal representative his only son Ladu Lal, was impleaded as party in the appeal. The court guardian was appointed by the order of this Court dated 30.1.1986 to represent the interest of the legal representatives of Mangi Lal, Ladu Lal who was minor. It was informed through court to the appellant that Ladu Ram also died, upon which time was sought by the learned counsel for the appellant for taking steps but no steps were taken even after long time, therefore, this Court dismissed the appeal as abated against respondent Mangi Lal and his legal representative Ladu Lal by order dated 17.5.2005. The respondents were given permission to raise objection about maintainability of the appeal due to abatement of the appeal against Mangi Lal and his legal representative Ladu Lal by the same order. According to the learned counsel for the respondents, Mangi Lal was co-plaintiff and obtained the decree for cancellation of the sale-deed dated 16.4.1973. He was impleaded as

respondent in second appeal preferred by the appellant-defendants. The appeal against Mangi Lal and his legal representative Ladu Lal has abated and consequence of which is finality of the decree dated 16.10.1981 passed by the first appellate court. It is submitted that in case decree dated 16.10.1981 is reversed, then there will be two conflicting decrees in the plaintiffs' suit, one in favour of Mangi Lal and his legal representative and another in favour of the appellant and against co-plaintiff Kishan Lal. The subject matter in the suit is the sale-deed dated 16.4.1973 and one sale-deed cannot have two values, one invalid for Mangi Lal and his descendants and another being valid in favour of the appellants. According to the learned counsel for the respondents, decree is inseparable, therefore, the appeal abated as a whole. The learned counsel for the respondents relied upon the recent judgment of the Hon'ble Apex Court delivered in the case of N. Khosla vs. Rajlakshmi(dead) and others ((2006) 3 SCC 605).

It is also submitted by the learned counsel for the respondents that the document dated 25.6.1965 evidencing partition of the property of Jagannath is in fact an admitted document or at least it is proved document. It is also submitted that the said document has not been denied by defendants-appellants in their written statement, rather as per the stand taken by defendant-appellants, they also claiming benefits from the document dated 25.6.1965, as is clear from the pleadings as

well as from the evidence of the defendants. In the deed dated 25.6.1965, Jagannath and his sons, plaintiffs and defendant no.1, clearly admitted that in *Nohra*, the plaintiffs no.1,2 and 3 each shall have 1/3 share. Jagannath agreed that he will live in the *Nohra* and will possess the agricultural land till his life time. Deceased Jagannath also signed the document dated 25.6.1965 and the document has been signed by the seller defendant Ram Sukh as well as his brothers and it has been signed by the attesting witnesses. Therefore, Jagannath admitted in the year 1965 that he shall not have any title in the *Nohra*. It is also submitted that in view of the said document, even if Will is held to be proved and executed by Jagannath by his free will in his fit physical and mental condition, even then no title passes on to defendant no.1 by virtue of Will because of the reason that the executant of the Will himself had no alienable interest in the *Nohra*. However, the learned counsel for the respondents also supported the finding of the first appellate court on issues about the property being ancestral and Will has been executed by Jagannath, not in his fit physical and mental condition.

The leaned counsel for the appellants relying upon the earlier judgment of the Hon'ble Apex Court reported in the case of Shahzada Bi and others vs. Halimabi (Since Dead) by her Lrs. ((2004) 7 SCC 354) which has been considered by the Hon'ble Supreme in N. Khosla's case (supra), submitted that the appeal cannot abate. Hon'ble the Apex Court

held that what was the interest of the deceased defendant in the case, whether he represented the entire interest or only a specific part is a fact that would depend on the circumstances of each case. If the interests of the co-defendants are separate, as in case of co-owners, the suit will abate only as regards the particular interest of the deceased party. A distinction must be made between the cases in which there is specification of shares or interests, and those in which there is no specification of interests. That in cases where there is a specification of share or interest, the appeal cannot abate as a whole but abates only in respect of the interest of the deceased respondent. According to the learned counsel for the appellants, in this case, deceased-respondent no.1 had 1/3 share and he was the co-owner of the property. His successor was his minor son Ladu Lal, who also died but according to the learned counsel for the appellants, Ladu Lal had no successor of Class-I and, therefore, the property devolved upon appellant no.1 and appellant no.3 and may be upon respondent no.2 and, therefore, the appeal can survive and cannot abate.

I considered the submissions of the learned counsel for the parties and perused the record also. The learned counsel for the parties provided copies of the deed dated 35.6.1965 and the Will dated 21.2.1972.

First of all it may be observed that deed dated 25.6.165 is

virtually is not a disputed document. Not only this even the Will produced by the defendants and particularly Ram Sukh, who is claiming the title by virtue of the Will itself reveals that deceased Jagannath in the registered Will admitted that the properties were partitioned and given to his three sons, ten years ago, which correspondences to the year 1965. It is nobody's case that the *Nohra* was also partitioned by metes and bounds or symbolically. The deed dated 25.6.1965 clearly provides that Jagannath and his wife shall have right of residence in the *Nohra*. Therefore, in view of the stand taken by the defendants themselves, it is clear that the plaintiffs and defendant no.1 each had 1/3 share in the suit property as on 25.6.1965. In fact by deed dated 25.6.1965, pre-existing share of the parties have been recognized and by the same deed, Jagannath admitted that he shall not have share in the property mentioned in the deed dated 25.6.1965 except his claim for certain benefits. Therefore, the question whether the suit property was ancestral property or not, became absolutely irrelevant. The reason is that in either case, the property remains having 1/3 share of the sons of deceased Jagannath and, therefore, Jagannath had no right to alienate the entire property in any manner including by Will in favour of Raj Sukh. In view of the above, the substantial question no.2 is decided accordingly and it is held that from 25.6.1965, Jagannath and his wife had no right, title and interest in the suit property except right of

residence. Therefore, Jagannath could not have disposed of the entire property by Will in favour of Ram Sukh. The consequence is that the plaintiffs and defendant no.1 are owners of the property having 1/3 share and the property sold is un-partitioned property of plaintiffs and defendant no.1 and, therefore, the defendant-purchaser-appellant no.2 could get only 1/3 share in the property which was of seller Raj Sukh. Though the first appellate court cancelled the sale-deed dated 16.4.1973 but that relief can be right in the context in which it has been passed. The plaintiffs themselves sought declaration only to the effect that it may be declared that the plaintiffs and defendant no.1 each are having 1/3 share in the property and the sale-deed against the interest of the plaintiffs may be cancelled. In view of the above, the judgment and decree of the trial court dated 16.10.1981 is only to the effect that the sale-deed was against the interest of the plaintiffs is ineffective and by the sale-deed, shares of the plaintiffs have not been sold in any manner.

In view of the findings recorded above, the execution of the Will by Jagannath is not very much relevant because he had no alienable right and could not have disposed of the property by Will. Therefore, substantial question no.1 does not survive.

Since this Court upheld the finding of the first appellate court and has not reversed the judgment and decree of the first appellate court,

therefore, the question of abatement of the appeal also does not arise because it will not result in the conflicting decrees.

So far as contention of the learned counsel for the appellants that Mangi Lal's only heir Ladu Lal, who was minor at the time when he was impleaded as party, did not marry or died before marriage and had no issue etc., cannot be examined at this stage of hearing of the appeal when the appellants did not submit any application in proper form before the appeal was dismissed as abated against deceased Ladu Lal. But at the same time, in view of the reasons mentioned above, the appeal cannot be dismissed merely as abated.

In view of the above, it is clarified that the sale-deed against the interest of the plaintiffs Kishan Lal and Mangi Lal and his successor is ineffective, null and void and the purchaser defendant no.2-Prem Shanker got 1/3 share in the property by sale-deed dated 16.4.1973.

The appeal of the appellants is, therefore, dismissed.

(**PRAKASH TATIA),J.**

mlt.